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No. 84-731

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

JOSEPH B. SHUMATE, JR.,

Petitioner,

v.

JAMES F. DOUTHAT, SUBSTITUTE TRUSTEE, et al,

Respondents.

On Petition For Writ of Certiorari to the United
States Court of Appeals for the Fourth Circuit

JOINT BRIEF OF RESPONDENTS IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

Benjamin C. Ackerly
Counsel of Record
Dennis T. Lewandowski
Hunton & Williams
P.O. Box 1535
Richmond, Virginia 23212
804/788-8479

George V. Hanna, III
Hayden J. Silver, III
Moore, Van Allen, Allen
and Thigpen
3000 NCNB Plaza
Charlotte, NC 28280
704/374-1300

Counsel for Pulaski
Furniture Corporation

Counsel for NCNB
Financial Services

William B. Poff
Thomas A. Leggette
Woods, Rogers, Muse,
Walker & Thornton
P.O. Box 720
Roanoke, Virginia 24004
703/982-4200

Counsel for James F. Douthat,
Substitute Trustee

59 pp

QUESTIONS PRESENTED

1. Whether the Court of Appeals properly held, in accordance with applicable statutory and case law, that the District Court had jurisdiction of a suit to set aside a foreclosure sale of real property belonging to a bankrupt debtor where such suit was related to or arising in a bankruptcy matter.

2. Whether the Court of Appeals properly held that a creditor's attorney may act as one of the substitute trustees under a deed of trust where the decisions of Virginia's highest court established that he may so act and where there is no evidence of any impropriety.

3. Whether the Court of Appeals properly held, in accordance with Virginia law, that Shumate had no standing to challenge the validity of a contract between Douthat and Pulaski and there was substantial evidence to support the District Court's findings that a valid contract was created.



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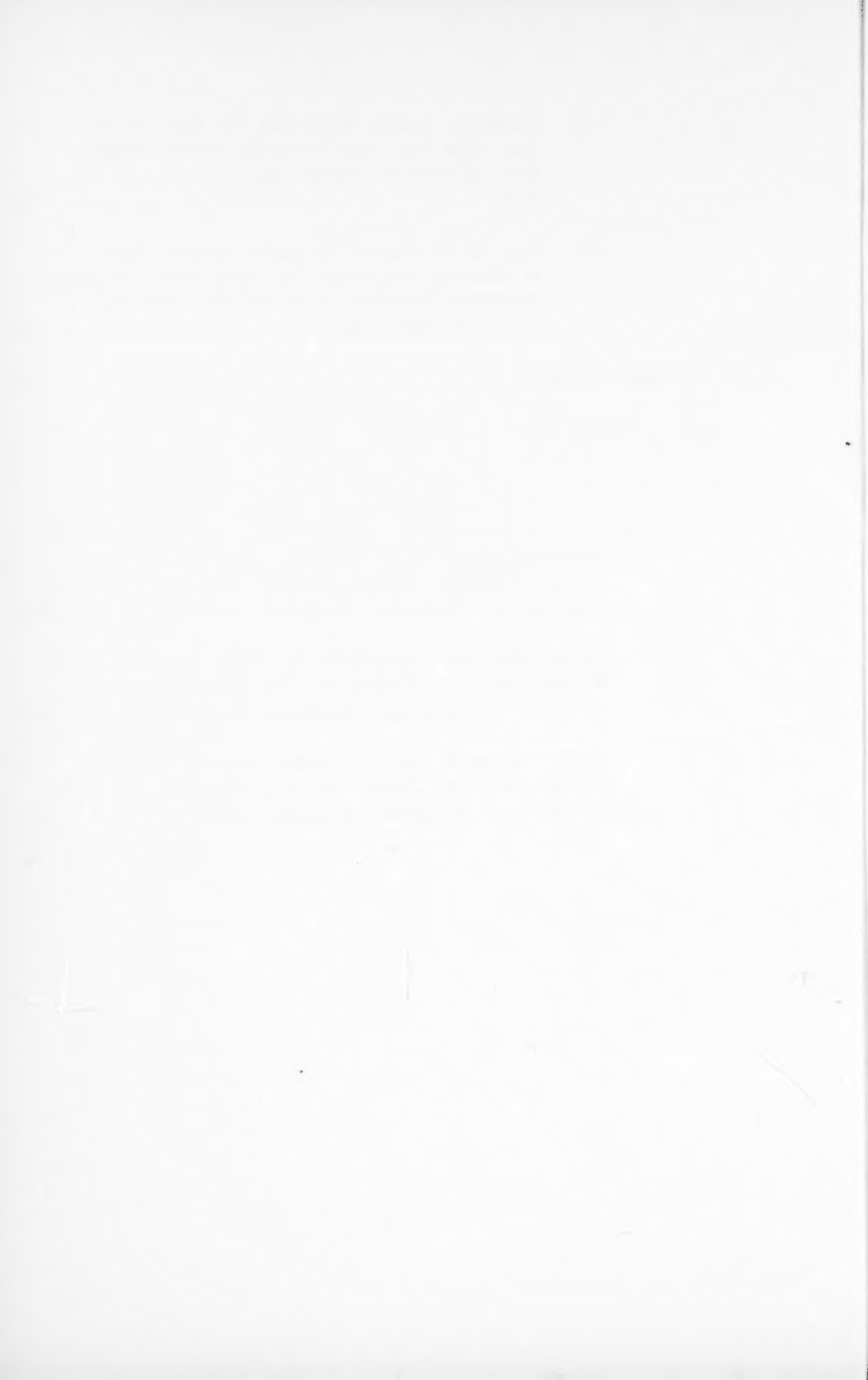


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STATEMENT OF THE CASE

A. Nature of the Case

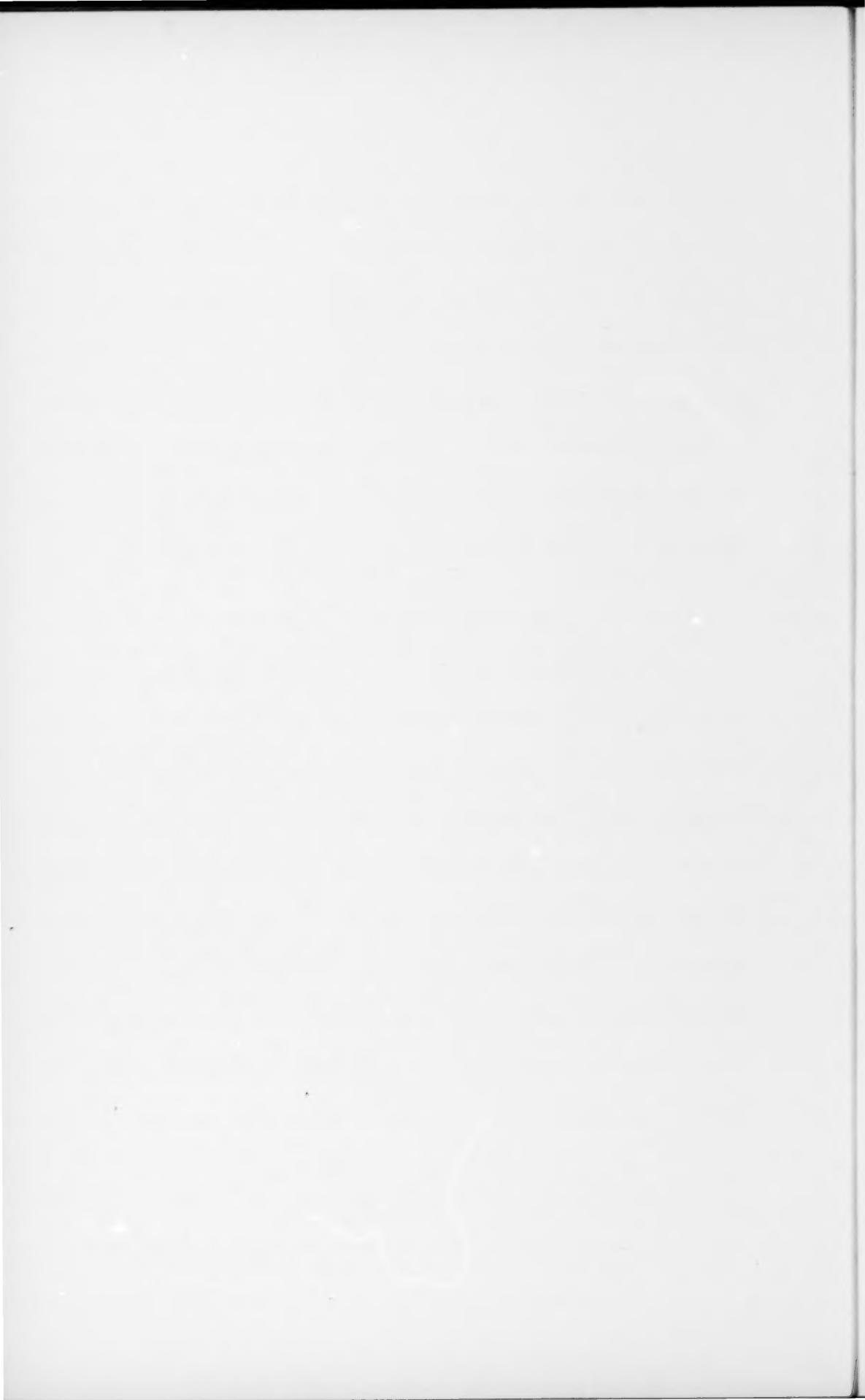
This is an action by Joseph B. Shumate (Shumate) to set aside the foreclosure sale of real property (the Real Property) belonging to Coleman Furniture Corporation, a Chapter 11 bankruptcy debtor, (Coleman) and order a new sale. Respondent James F. Douthat (Douthat) is the substitute trustee who conducted the foreclosure sale pursuant to a first deed of trust (the First Deed of Trust) on the Real Property. Respondent NCNB Financial Services



(NCNB FS) is the holder of a note dated January 4, 1978, payable to the order of NCNB FS in the original principal amount of \$3,500,000.00 executed by Coleman (the Note) and secured by the First Deed of Trust. Respondent Pulaski Furniture Corporation (Pulaski) was the high bidder at the foreclosure sale. Shumate is the former president of Coleman who held notes of Coleman secured by junior liens on the Real Property.

B. The Proceedings Below

On or about August 15, 1983 Shumate filed a complaint in the Circuit Court of Pulaski County, Virginia, seeking to set aside the foreclosure sale of the Real Property upon the grounds that it was improper for Douthat to act as substitute trustee under the Deed of Trust when he had served as attorney for NCNB FS in the Coleman bankruptcy proceeding and that Douthat failed to conduct the foreclosure sale fairly and impartially, resulting in the Real Property being sold for a grossly inadequate price. In connection with the complaint, Shumate caused to be



recorded in the Clerk's Office of the Circuit Court of Pulaski County on or about August 12, 1983 a memorandum of lis pendens reciting the fact that there was a suit pending in the Circuit Court of Pulaski County seeking to set aside the foreclosure sale.

On November 8, 1983 the Honorable James C. Turk, Judge of the United States District Court for the Western District of Virginia, entered an order, which all parties including Shumate consented to, transferring the complaint filed in the Pulaski County Circuit Court to the District Court. (App. B) Judge Turk subsequently recused himself and the case was assigned to the Honorable Glen M. Williams.

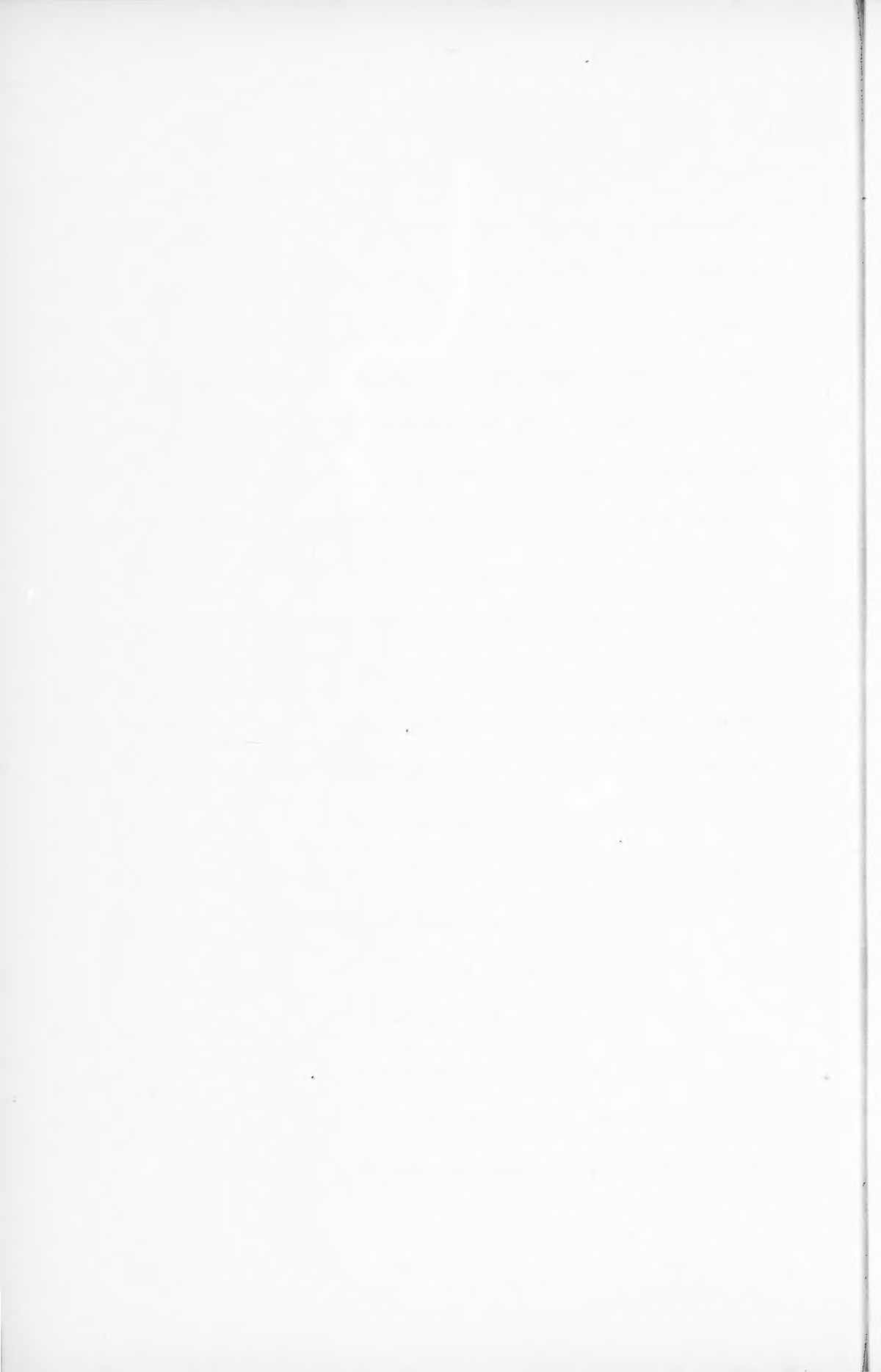
On January 23, 1984 Judge Williams entered an order that the lis pendens was void "in that the Circuit Court of Pulaski County, Virginia was without jurisdiction to hear the suit described in the lis pendens" and therefore the lis pendens should be quashed. Shumate subsequently recorded a second memorandum of lis pendens in the Circuit Court of Pulaski County describing the suit pending in the District



Court. On February 21, 1984 the District Court permitted Shumate to amend his complaint to add two additional grounds for setting the sale aside; that the Real Property was not sold in compliance with the terms of the First Deed of Trust and that the Real Property was not sold as provided for in the advertisement of the foreclosure sale. On March 5, 1984 the District Court permitted Shumate to amend his complaint a second time by adding thereto an allegation that the foreclosure sale was void because there was no meeting of the minds between the seller and buyer.

The case was tried on April 5 and 6, 1984 before Judge Williams and an advisory jury. At the conclusion of Shumate's evidence, the Respondents each moved for an involuntary dismissal pursuant to Rule 41(b), which was granted. Judgment was entered for the Respondents and the District Court approved and confirmed the July 15, 1983 foreclosure sale.

On April 16, 1984 Shumate filed a motion for a new trial, which was denied on April 27, 1984. On May 3, 1984 Shumate filed his notice of appeal to the United States Court of Appeals for the Fourth Circuit.



At no time subsequent to the July 15, 1983 foreclosure sale did Shumate seek to stay consummation of the sale pending the outcome of this litigation. The sale to Pulaski was consummated. When Shumate appealed to the Court of Appeals, Respondents asked the District Court to order Shumate to post a bond, even though no stay was requested, since the appeal would delay and perhaps jeopardize the renovation of the Real Property and its operation as a furniture plant employing initially 350 people in Pulaski County.

The District Court, on May 15, 1984, ordered that Shumate post a supersedeas bond in the amount of \$2,000,000.00 as a condition of the appeal to protect the Respondents from injury during the pendency of the appeal. The bond was reduced by the Court of Appeals to \$5,000.00 on May 18, 1984, because Shumate had not requested a stay, but the hearing on the merits of the appeal was accelerated in recognition of the fact that the pendency of the appeal, even though no stay was requested, was tantamount to a stay since the appeal was a cloud on title.



Because Shumate raised on appeal the question of jurisdiction, the Court of Appeals, to resolve such jurisdictional issue, took notice of certain court orders which were outside of the direct record in this case. Specifically, on May 19, 1983, Judge Turk entered an order in the Coleman bankruptcy case (the May 19 Order) abandoning the Real Property and modifying the automatic stay of 11 U.S.C. § 362(a) as to NCNB FS so as to permit NCNB FS to exercise its right as a secured creditor against certain assets of Coleman, including the Real Property as well as Coleman's machinery and equipment. (App. A) No appeal was taken from the May 19 Order. Subsequent to the July 15, 1983 foreclosure sale of the Real Property, and prior to this suit's transfer from the Pulaski County, Virginia, Circuit Court to the District Court, Shumate instituted three separate actions in the District Court, seeking first to enjoin the sale of Coleman's machinery and equipment by NCNB FS and then to enjoin the transfer of the machinery and equipment to the successful bidder pending resolution of this suit.



C. Statement of Facts

Coleman conveyed the Real Property to John B. Spiers, Jr. and Duane E. Mink, Trustees, by the First Deed of Trust dated December 28, 1977 to secure the obligations of Coleman to NCNB FS evidenced by the Note.

On November 3, 1982, Coleman filed a petition for relief under Chapter 11 of the United States Bankruptcy Code (11 U.S.C. § 1101, et seq.) and was continued in possession of its property, including the Real Property, as debtor in possession. At the time of filing its Chapter 11 petition Coleman was in default in its undertakings and obligations under the Note.

On February 18, 1983 Judge Turk, who was presiding over the Coleman bankruptcy, entered an order appointing Bert Ely as Trustee of the estate of Coleman. Subsequent to his appointment as trustee, Ely retained the services of Hubert Thomas to assist Ely in trying to sell the assets of Coleman Furniture, including the Real Property, as a going concern. Those efforts were exhaustive but unsuccessful.



Judge Turk then entered the May 19 Order abandoning certain of the assets of Coleman, including the Real Property, and modifying the automatic stay of 11 U.S.C. § 362 so as to permit NCNB FS to dispose of those assets pursuant to its security documents free and clear of all liens, claims, encumbrances and obligations. There was no appeal of the May 19 Order.

Pursuant to the terms of the First Deed of Trust, Douthat and Thomas T. Palmer were appointed Substitute Trustees and on June 7, 1983 Douthat hand delivered his letter of the same date to Judge Turk, Shumate, and the Trustee in Bankruptcy. This letter indicated that Coleman had defaulted, it declared the entire unpaid balance immediately payable and stated that the Real Property secured by the Deed of Trust would be sold at foreclosure. Attached to the letter was a copy of the notice of trustee's sale. Shumate acknowledged receipt of the letter. Subsequently, the Substitute Trustees advertised in The Southwest Times and Roanoke Times & World News their intention to sell the Real Property at public foreclosure

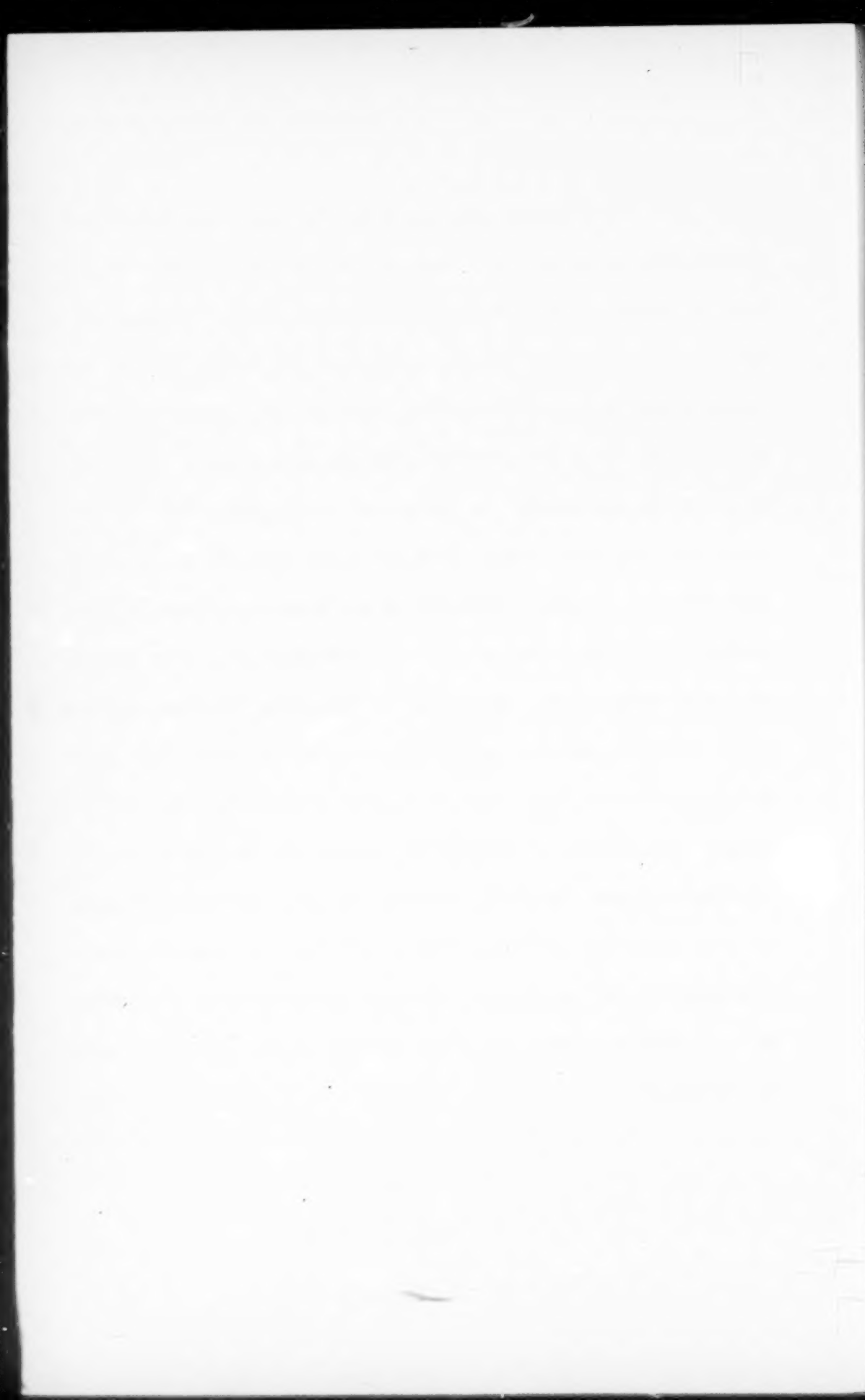


sale on July 15, 1983. Shumate acknowledged having seen the advertisement in the local paper. Shumate also acknowledged on cross examination that, prior to July 15, 1983 he had seen a letter dated June 24, 1983 from Douthat addressed to Shumate's counsel, advising that the inventory and equipment was going to be sold at a separate sale on August 23 and 24, 1983.

On July 12, 1983 Coleman and Shumate filed a Bill of Complaint in the Circuit Court of Pulaski County seeking to enjoin the Substitute Trustees' sale of the Real Property. By order entered that same day, the Circuit Court of Pulaski County dismissed the Complaint, with leave to the parties to take such action as they deem appropriate in the United States District Court. Immediately thereafter Shumate, individually and on behalf on Coleman, filed a complaint in the District Court seeking to enjoin the foreclosure sale of the Real Property. Judge Turk, by order from the bench, denied Shumate's request to enjoin the foreclosure sale. There was no appeal of this order.



The foreclosure sale on July 15, 1983 was conducted by Douthat as Substitute Trustee and he was assisted by Roy V. Creasy, the new Trustee in Bankruptcy for Coleman. Between 100 and 200 people attended the sale. Prior to commencement of the sale, which was held on the courthouse steps of the Pulaski Circuit Court, Douthat announced, according to Shumate's testimony, that he was only selling the real estate and the four walls. Specifically, Douthat referred to an appraisal which he had available that included a list of personal property which was not being sold. According to Shumate, Douthat invited those present at the sale to speak up if they had any questions as to what was being sold. According to Marvin Barman, an officer of NCNB FS called by Shumate as an adverse witness, Shumate did not ask any questions or look at the material Douthat had available for examination. There were no questions. No one professed any confusion. No one protested the sale, and no one asked that the sale be postponed.



The auction was broken into three parts. Initially, bids were taken on unimproved land in Dublin, Virginia;^{1/} then on the land and improvements in Pulaski, Virginia;^{2/} then a third set of bids was taken on the whole, with the bid going to the highest of either the bids on the sum of the parts or of the bid on the whole.

Barman and Ira Crawford, an employee of Pulaski, testified that after an initial bid by a local Pulaski real estate agent the subsequent bidding was between NCNB FS and Pulaski, that the sale was adjourned several times for Barman to call for instructions and that Pulaski was the high bidder at \$2,000,000.00. In accordance with the terms of the sale, Pulaski deposited \$200,000.00 with Douthat.

1/ This tract of land consists of 106.47 acres of vacant land adjacent to the Town of Dublin in Pulaski County, Virginia.

2/ This property consists of Plant No. 1 and Plant No. 2 of Coleman, containing approximately 800,000 square feet of improvements constructed between 1923 and 1966 and used by Coleman as a furniture manufacturing facility which had the capacity of employing 700-800 workers.



The only evidence offered by Shumate in support of his allegation that the sale was void because there was no meeting of the minds as to what was being sold was the adverse testimony of Barman and Crawford. They testified that subsequent to the foreclosure sale, a dispute arose between Pulaski and NCNB FS as to whether certain items of personal property were included in the July 15, 1983 foreclosure sale. Barman testified that Douthat announced at the beginning of the auction that he was only selling real estate, "the four walls and the dirt", that if anyone had any questions they should speak up, that no one did so, and that if anyone was in doubt as to whether property was real or personal they should assume it was personal and not being sold. Crawford, who attended the sale on behalf of Pulaski, acknowledged that he may not have heard the instructions given by Douthat at the beginning of the sale since he and Mr. T. G. Wampler, the other representative of Pulaski at the sale, were busy discussing their bidding strategy.



Barman testified that as a result of this dispute with Pulaski, and to avoid costly litigation, NCNB FS agreed to purchase, and Pulaski agreed to sell, its \$2,000,000.00 bid to NCNB FS. By agreement dated August 17, 1983 between Pulaski, NCNB FS and Thomas T. Palmer as Substitute Trustee, Pulaski assigned all its right, title and interest in its bid to NCNB FS in return for NCNB FS' agreement to pay to Pulaski the sum of \$200,000.00, being the deposit paid by Pulaski to Douthat. Some three months later Pulaski reacquired its bid from NCNB FS for \$2,000,000.00, the amount of the original bid. Pulaski then purchased from NCNB FS, at a private sale for approximately \$1,000,000.00, certain personal property of Coleman that was covered by a security agreement in favor of NCNB FS which was separate from the deed of trust.

Other than establishing that Douthat represented NCNB FS in the Coleman bankruptcy proceeding, Shumate offered no evidence to support ~~his~~ ^{the} allegation that the foreclosure sale should be set aside because Douthat acted as Substitute Trustee. Barman testified that NCNB FS used



Douthat as substitute trustee to save money since Douthat was compensated by the hour rather than on a percentage of the sales price.

II

REASONS FOR DENYING THE WRIT

Shumate's Petition For Writ Of Certiorari should be denied as there is no conflict between the holding of the Court of Appeals and the decisions of this Court or the decisions of the circuits. Shumate alleges no departure from the accepted and usual course of judicial proceedings nor suggests the existence of an important federal question involving matters of public concern reaching constitutional dimensions.^{3/}

The Court of Appeals' decision is in full accord with applicable statutory law and with the decisions of other federal courts and the Supreme Court of Virginia.

3/ In fact, Shumate's Petition is a verbatim recitation of the first three issues contained in the brief he submitted in the Court of Appeals.



A. The Court of Appeals' Decision That The District Court Had Jurisdiction Of This Suit Is In Accordance With Applicable Statutory And Case Law

Shumate never questioned the jurisdiction of the District Court to hear his complaint to set aside the sale of the Real Property until his appeal.^{4/} On appeal he argued that jurisdiction was lacking because the Real Property was abandoned as an asset of the Coleman bankruptcy and once a bankruptcy trustee abandons an

4/ While Respondents acknowledge that jurisdiction may be raised for the first time on appeal and that such jurisdiction cannot be consented to or waived, this Court should note that this suit was transferred from the Pulaski County, Virginia, Circuit Court to the District Court upon the joint motion of Shumate and the Respondents (see November 8, 1983, Order, App. B) and, after the case was properly transferred to the District Court, Shumate sought and was granted leave to amend his Complaint on two separate occasions, without ever objecting to jurisdiction. In addition, subsequent to the initiation of this suit and prior to its transfer to the District Court, Shumate filed three separate adversary proceedings in the District Court seeking first to enjoin the public auction sale of Coleman's machinery and equipment by NCNB FS and then to enjoin the transfer of such machinery and equipment to the successful bidders. In each case Shumate alleged that the District Court had jurisdiction even though the machinery and equipment had been abandoned along with the Real Property in the May 19 Order.



asset, he is forever precluded from reclaiming it. The Court of Appeals determined that the District Court had jurisdiction pursuant to 28 U.S.C. § 1471(a) and (b). The Court of Appeals reasoned that although the bankruptcy trustee may abandon property and once that property is abandoned it cannot be reclaimed by the trustee, the abandonment does not divest the District Court of jurisdiction.

Shumate confuses the powers of the trustee in bankruptcy with the jurisdiction of the District Court over bankruptcy matters. The fact that a trustee may not reclaim the Real Property is a matter entirely separate and distinct from the jurisdiction of the District Court over the Real Property. In the case of In re Bennett, 13 B.R. 643 (Bankr. W.D. Mich. 1981) it was held that the abandonment of property would not preclude the bankruptcy court from hearing a complaint subsequently filed by the debtor to avoid a security interest in that property.

Property which is abandoned from the bankruptcy estate passes back to the debtor and becomes, for



bankruptcy purposes, property of the debtor. In re Motley, 10 B.R. 141, 145 (Bankr. M.D. Ga. 1981), citing 2 Collier on Bankruptcy ¶ 362.04(5) p. 362-34 (15th ed.). The automatic stay provisions of the Bankruptcy Code apply to acts against property of the debtor.^{5/} Since abandoned property is property of the debtor the application of the automatic stay to actions against property of the debtor recognizes that the bankruptcy court retains jurisdiction over property even though it is abandoned. In Motley, the holder of a second deed of trust on the debtor's real estate foreclosed on that property after it had been abandoned, without first obtaining relief from the automatic stay. The court held that although the property reverted to the debtor upon abandonment the automatic stay remained in effect as to the abandoned property.

Also, the bankruptcy court retained jurisdiction over the Real Property under 28 U.S.C. § 1471(e) which states that:

^{5/} 11 U.S.C. § 362(a)(5) stays acts to create, perfect or enforce liens securing prepetition claims against property of the debtor.



The bankruptcy court in which a case under title 11 is commenced shall have exclusive jurisdiction of all of the property, wherever located, of the debtor, as of the commencement of such case.

It is undisputed that the Real Property belonged to Coleman as of the commencement of the case and the case was still pending before the District Court at the time this suit was tried. Therefore, the District Court, sitting in this case as a bankruptcy court, had jurisdiction over the Real Property.

The Court of Appeals held that the District Court had jurisdiction pursuant to 28 U.S.C. § 1471(a) and (b).^{6/}

6/ 28 U.S.C. § 1471(a) and (b) states that:

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11 or arising in or related to cases under title 11.



The Court of Appeals stated that United States District Courts have original jurisdiction over all bankruptcy matters brought under Title 11 and all civil proceedings arising under or related to bankruptcy matters,^{7/} and since the foreclosure sale of the abandoned property in this case was related to the bankruptcy proceedings, the District Court properly exercised its jurisdiction.

Shumate's suit clearly related to the bankruptcy proceedings. The May 19 Order specifically authorized NCNB FS to enforce its security interest in the Real Property and to pass title free and clear of all liens on the Real Property, plus it directed NCNB FS to report to the District Court concerning the sale and the application

^{7/} This broad jurisdictional grant was intended to be exercised by bankruptcy courts pursuant to § 1471(c). However, this Court, in Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982), held that the exercise of jurisdiction by a non-Article III tribunal was unconstitutional. But this decision did not invalidate the jurisdictional grant of § 1471 to district courts. In re Kaiser, 722 F.2d 1574 (2d Cir. 1983). Accord In re Guaranty Chevrolet, 35 B.R. 381 (Bankr. S.D. Cal. 1983). See also, Northern Pipeline Construction Co., 458 U.S. at 54, n. 3.

of the proceeds from the sale.^{8/} Shumate's suit challenges the very essence of the District Court's May 19 Order. It seeks to prevent the conveyance of the Real Property to Pulaski, to prevent NCNB FS from completing the enforcement of its security interest, and to set aside a foreclosure authorized by the May 19 Order. Shumate's suit clearly related to the bankruptcy proceedings since it attacked an order entered by the District Court in the bankruptcy proceeding relating to the administration of the case.

For these reasons the abandonment of the Real Property does not, as Shumate argues, divest the District Court of jurisdiction. The Court of Appeals was correct when it held that the District Court properly exercised its jurisdiction under 28 U.S.C. § 1471(a) and (b) to hear and decide Shumate's Complaint.

8/ Specifically, the May 19 Order retained jurisdiction over the foreclosure sale for the purpose of determining that there was a proper accounting and allocation of the sale proceeds. This was important to the administration of the bankruptcy estate because all of the assets against which NCNB FS claimed a lien had not been abandoned and were subject to a claim by NCNB FS in the event the foreclosure sale left NCNB FS with a deficiency.



**B. In Affirming the District Court's Finding
That Douthat Properly Performed His Duties As A
Substitute Trustee Under A Deed of Trust, the
Court of Appeals Acted in Accordance With the
Decisions of Virginia's Highest Court and Properly
Concluded That Such Finding Was Not
Clearly Erroneous**

As the Court of Appeals recognized, under Virginia law a creditor's attorney may serve as trustee under a deed of trust. Terry v. Fitzgerald, 73 Va. (32 Gratt.) 843 (1879); Goddin v. Vaughn's Ex'x, 55 Va. (14 Gratt.) 102 (1858). If it were otherwise, the vast number of foreclosure sales in Virginia would be subject to attack since it is quite common for the creditor's attorney to act as the trustee under a deed of trust.

Illustrative of the Virginia rule is Goddin. There, the defendant-appellant raised as error, inter alia, the lower court's appointment of plaintiff's counsel as the commissioner to sell the property in controversy if defendant should fail to comply with the court's decree. In rejecting this claim of error, the Court stated:



It is the constant practice of the courts to name the counsel prosecuting a claim to a decree for the sale of property as the commissioner, and I am not aware that the legality of such an appointment has been heretofore questioned. . . .

Goddin, 55 Va. at 127-28.

Similarly, in reversing the circuit court's dissolution of an injunction enjoining the sale of property under a deed of trust, the Supreme Court of Virginia in Terry, 73 Va. at 852, opined that while the lower court should have retained the cause and had the sale made under its supervision, it could have appointed as commissioner for such sale the creditor's attorney who had been made the substitute trustee, provided that he was not otherwise deemed unfit. Thus, under Virginia law the fact that Douthat was also the creditor's attorney did not of itself incapacitate him from accepting the trust. Other deed of trust states also follow this rule. Donaldson v. Mansel, 615 S.W.2d 799 (Tex. 1980); Pence v. Jamison, 94 S.E. 383 (W. Va. 1917).



It should further be noted that Legal Ethics Opinion Number 336, readopted by the Virginia State Bar Council in 1983, recognized the propriety of the creditor's attorney being substituted as the trustee under a deed of trust. That Opinion states:

Trustee on a second deed of trust for the benefit of seller represented buyer in a real estate closing. Seller was not represented. When buyer defaulted on the second deed of trust, seller retained counsel who requested that he be substituted as trustee. The trustee should resign as requested.

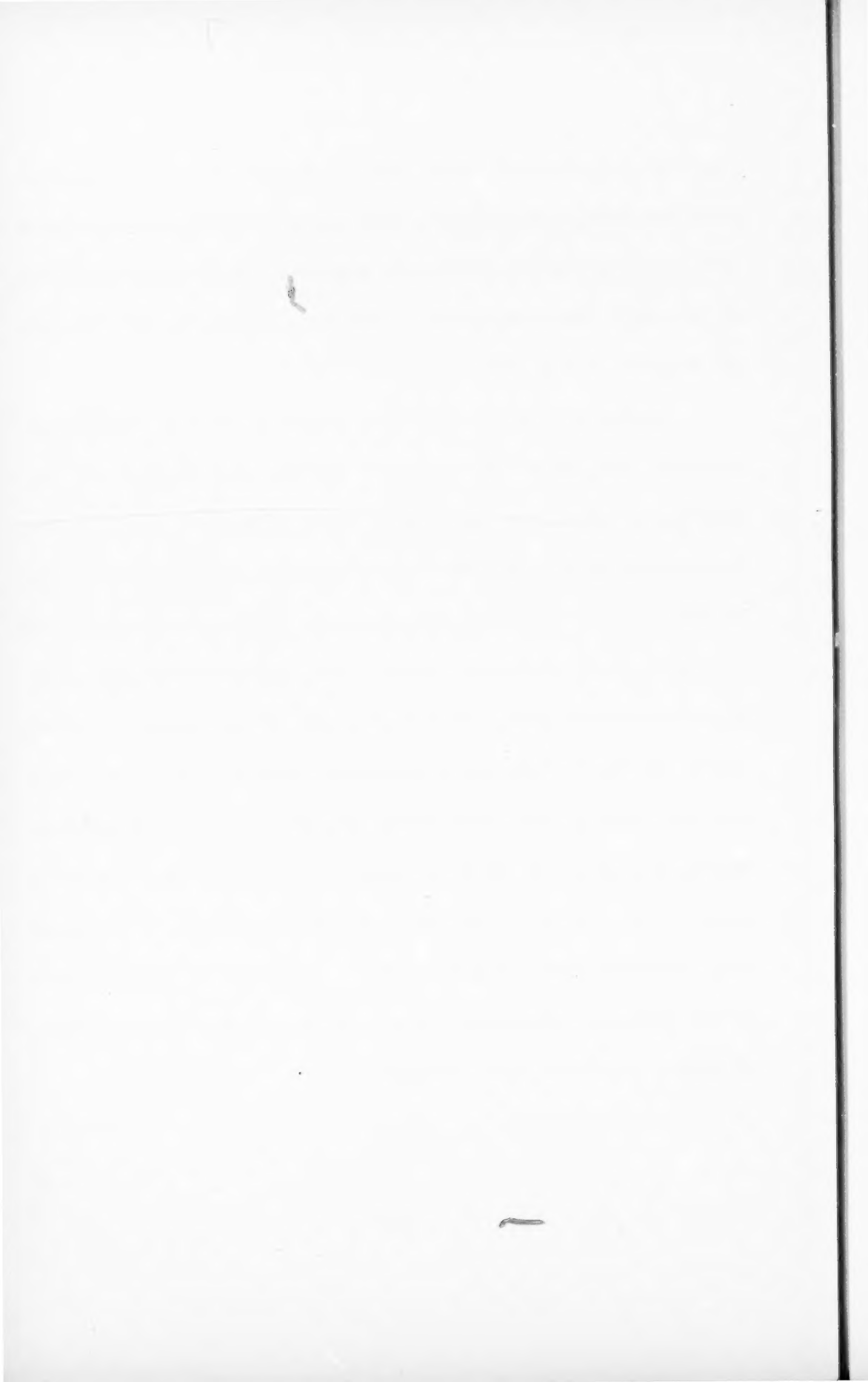
It follows, therefore, that if the initial trustee was required to resign when requested, the creditor's attorney who made such request could appropriately be substituted as trustee.

Despite this authority to the contrary, Shumate argues that the Court of Appeals erred in affirming the judgment of the District Court. Not being able to point to any evidence which indicates that Douthat acted other than properly in performing his duties as a substitute trustee, Shumate is forced to claim that the mere fact that Douthat was also the creditor's attorney in litigation



pending before the bankruptcy court, standing alone, automatically disqualified him as a trustee under Virginia law. The basis for Shumate's argument is dictum contained in a legal encyclopaedia. But this dictum is not the law of Virginia and is without merit.

Moreover, as the Court of Appeals further recognized, Shumate was aware of Douthat's appointment as one of the substitute trustees and could have objected prior to the foreclosure sale. At the trial, Shumate conceded knowing in early June of 1983 that Douthat had been made one of the substitute trustees under the deed of trust. He admitted receiving Douthat's letter of June 7, 1983, indicating that Coleman's property was to be sold. Yet neither during the five week period prior to the sale nor during the sale did he ever object to Douthat acting as a substitute trustee. Indeed, the day before the foreclosure sale Shumate was present in the chambers of Judge Turk when Douthat explained how the sale would take place. Shumate, however, said nothing.



If Shumate was concerned about any possible conflict caused by Douthat acting as one of the substitute trustees, he could have asked Douthat to step aside prior to the sale or could have sought an order having the court supervise the sale. Terry, 73 Va. at 850. But Shumate did neither. In fact, in each of his unsuccessful suits to enjoin the sale brought in the Circuit Court of Pulaski County and in the District Court he failed even to raise the issue of a possible conflict of interest. Rather, it was first raised one month after the sale.

By failing to object while having full knowledge that Douthat was acting as a substitute trustee, Shumate waived any right to object and is estopped because of laches from raising the bald conclusory claim of an alleged conflict of interest. Stokes v. Hinden, 85 F.2d 200 (D.C. App. 1936) (Because the appellants knew before the sale that the trustee was an employee of the attorneys for the creditor and had the opportunity to advise the court of any disqualifying facts, they cannot complain after the sale has been completed.); Ravold v. Grumme, 94 S.W. 298 (Mo.



1906) (Because the appellant knew before the sale that the trustee was the son of the creditor and failed to make a timely application to enjoin or prevent the sale, she is barred by laches from seeking relief after the sale has occurred.).

In summary, Shumate's claim of a conflict lacks merit because the Court of Appeals properly applied Virginia law, because it properly concluded that the District Court's finding was not clearly erroneous, and because Shumate waived any objection and is estopped by his own inaction.

**C. The Court of Appeals Properly Held In Accordance
With Virginia Law That Shumate Had No Standing To
Challenge The Validity Of A Contract Between Douthat
And Pulaski And There Was Substantial Evidence To
Support The District Court's Findings
That A Valid Contract Was Created**

The District Court found that a valid and enforceable contract for the sale of the Real Property was created at the July 15, 1983 sale. Although the District Court's finding is based on substantial evidence in the record and was affirmed by the Court of Appeals, Shumate nonetheless



contends that the finding is clearly erroneous ~~because~~ because Pulaski bid on the Real Property with the misapprehension that certain personal property was also being sold at the auction. Shumate thus claims that there was no "meeting of the minds" at the auction, and therefore no sale occurred.

As the Court of Appeals held below, however, Shumate has no standing under Virginia law to challenge the validity of the contract between Douthat and Pulaski's representative. Further, the evidence at trial demonstrated that Pulaski failed to listen to Douthat's announcements prior to the auction; these announcements clearly informed potential bidders that certain personal property was not being offered for sale. The law of Virginia provides that Pulaski's failure to hear Douthat's announcements at the sale does not provide grounds to set the sale aside.



**1. Shumate Lacks Standing to Set Aside
The Sale On The Grounds That Pulaski
Was Mistaken About The Terms Of The Sale**

The Court of Appeals properly concluded that Shumate lacks standing to set aside the sale on the grounds that there was no meeting of the minds. Shumate was not a party to the contract of sale nor was he intended to benefit from the contract. For a third party beneficiary to maintain an action on a contract, "[he] must clearly show that the contracting parties definitely intended the contract to confer a benefit upon him . . .; incidental beneficiaries may not sue thereon." Richmond Shopping Center, Inc. v. Wiley N. Jackson Co., 220 Va. 135, 142, 255 S.E.2d 518, 523 (1979) (citations omitted); see also, Valley Landscape Co., Inc. v. Rolland, 218 Va. 257, 237 S.E.2d 120 (1977); Graybar Electric Co. v. Doley, 273 F.2d 234 (4th Cir. 1959).

Shumate was not a party to the sales contract, nor did Douthat or Pulaski intend that he be a beneficiary. Under the sales contract, Pulaski's primary intent was to benefit NCNB FS by paying \$2,000,000.00 for the Real



Property. Shumate did not and was not intended to benefit from the sale. Although his liability as the guarantor of Coleman's obligations to NCNB FS was reduced, this only incidentally benefitted Shumate, and incidental beneficiaries are not entitled to standing as third party beneficiaries. See Norfolk-Portsmouth Newspapers, Inc. v. Stott, 208 Va. 228, 231, 156 S.E.2d 610, 612 (1967).

Shumate also lacks standing to challenge the foreclosure sale on the grounds of mistake because a contract made under one party's mistake is only voidable by the mistaken party. S&J Associates v. Jay's Trucking Co., Inc., 26 B.R. 73, 76 (Bankr. E.D. Va. 1982); Restatement (Second) of Contracts § 153 (1981). Pulaski, not Shumate, was the mistaken party, and only the mistaken party can avoid the contract. Rather than seeking to void the contract produced at the auction, the parties instead chose to ratify the contract. As ratification of a voidable contract "extinguishes the power of avoidance," the rights of any party, including Shumate, to set aside the sale were terminated once Pulaski assigned its bid to NCNB FS. See



Restatement (Second) of Contracts § 7 (1981). For these reasons the Court of Appeals correctly held that Shumate lacks standing to challenge the foreclosure sale on the grounds that there was no meeting of the minds between Douthat and Pulaski at the auction.

2. The Trial Court Properly Found That A Binding Contract of Sale Was Created Between Douthat and Pulaski At The July 15, 1983 Sale

Regardless of whether Shumate possesses standing to challenge the July 15, 1983 contract between Douthat and Pulaski, there is substantial evidence in the record to support the District Court's finding that the sale of July 15, 1983 created a binding and enforceable obligation on Pulaski to purchase the Real Property. Douthat announced plainly and clearly the terms of the sale, and, although Pulaski may have misunderstood or failed to hear the terms announced, these terms were still binding on Pulaski. See Holston v. Pennington, 255 Va. 551, 304 S.E.2d 287 (1983); Definite Contract Building & Loan Ass'n v. Tumin, 158 Va. 771, 164 S.E. 562 (1932). Shumate's



contentions that the terms of the sale were too vague, or that Pulaski was justifiably mistaken about the terms of the auction, are unsupported by his own evidence. Thus, contrary to Shumate's contention, Pulaski's subsequent assignment of its bid is not voidable as a "private" sale in violation of Va. Code § 55-59, but rather stands as a proper assignment of Pulaski's previously acquired right to purchase the Real Property.

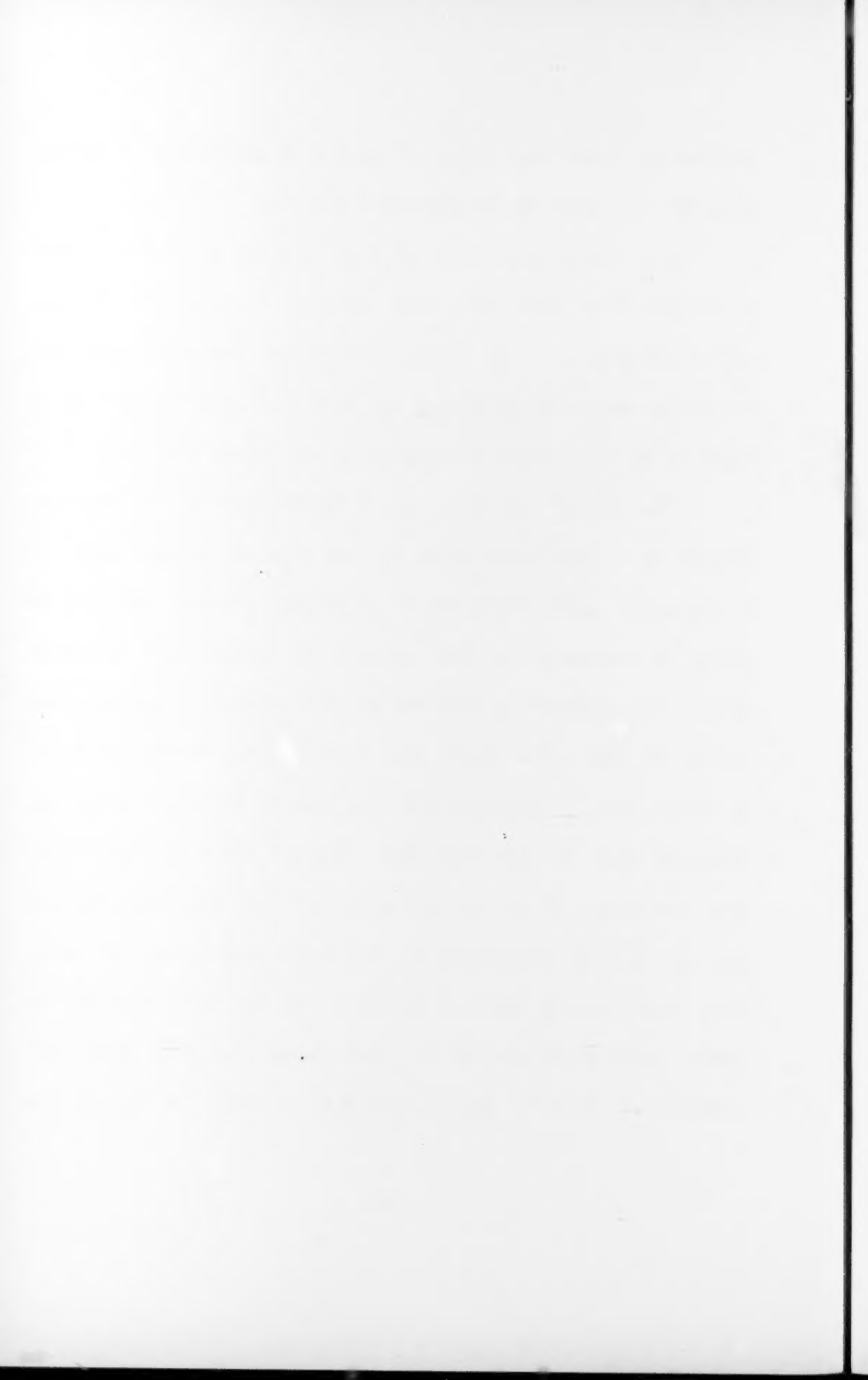
At the trial both Marvin Barman, a representative of NCNB FS, and Shumate testified that Douthat began the auction by announcing that he was selling only "the four walls and the dirt." He specifically excluded certain personal property from the sale, including the dust collector system, the machinery and equipment, and other personal property. Douthat also invited the surrounding audience of 100 to 200 persons to examine a plat and an appraisal which described the Real Property. If the audience had any questions about what was being sold, he encouraged them to ask their questions. No person did. Finally, Douthat stated that if anyone had a doubt as to whether a



particular item was real or personal property, he should consider the item to be personal property.

Ira Crawford, one of the Pulaski employees who attended the auction, was unable to recall these announcements. In fact, Crawford testified that he probably was not listening to everything Douthat said because he was concentrating on preparing to bid.

The terms of sale orally announced at an auction constitute a continuing offer by the trustee, subject only to acceptance upon submission of a bid. Once the bid is made in response to the announced terms, and knocked down, the contract is created at that instant. Holston, 304 S.E.2d at 290. The mere fact that Pulaski failed to hear or may have misunderstood the announced terms does not establish that no sale occurred. Rather, "[w]here the terms and conditions of an auction sale are plain and unambiguous and are plainly announced at the time and place of sale, they are binding upon a purchaser at the sale, whether he heard them announced or not and though he may have not understood them." Tumin, 164 S.E. at 565. In Tumin, the



purchaser had failed to hear the auctioneer's oral announcement that the property was being sold subject to a prior lien. At the trial of the action seeking to enforce the purchaser's bid, the purchaser proffered to the trial court a jury instruction that stated there could be no sale if the purchaser had misunderstood the terms of the sale. The Supreme Court of Virginia upheld the trial court's refusal to give this instruction, and noted that the purchaser's failure to hear, or her misunderstanding of, the auctioneer's announcement did not void her bid. Id.

The law of mistake in Virginia similarly offers no support for Shumate's contentions. A unilateral mistake does not suffice to set aside a sale, the mistake must instead be mutual. Branton v. Jones, 222 Va. 305, 281 S.E.2d 799 (1981); Pechin v. Porterfield, 128 Va. 53, 104 S.E. 695 (1920); Redd v. Dyer, 83 Va. 331, 2 S.E. 283 (1887). In Branton, the vendor of property at a judicial sale sought to set aside the sale upon learning that the parcel sold contained less acreage than the seller had believed. The Court refused to rescind the sale, holding

that before it could do so, the "mistake must be mutual . . . unless it was 'induced by the fraud or culpable negligence of the other.'" Branton, 281 S.E.2d at 800-801 (citations omitted). No evidence of fraud or negligence has been presented or alleged here. The evidence at trial instead established that both Douthat and Barman clearly understood the terms of the sale, and any mistake was solely attributable to Pulaski.

Thus Shumate's contentions that the July 15, 1983 sale was invalid find no support under Virginia law. The Court of Appeals properly held that Shumate had no standing to invalidate the sale, and the District Court's finding that the July 15, 1983 sale created a binding, enforceable contract of sale between Pulaski and Douthat is based on ample and substantial evidence in the record.

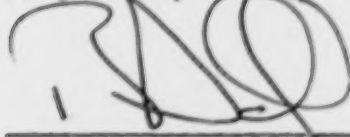
III

CONCLUSION

For these reasons, the Petition For Writ of Certiorari should be denied.



Respectfully submitted,



Benjamin C. Ackerly
Counsel of Record for
the Respondents

December 3, 1984

Benjamin C. Ackerly
Counsel of Record
Dennis T. Lewandowski
Hunton & Williams
P.O. Box 1535
Richmond, Virginia 23212
804/788-8479

Counsel for Pulaski Furniture Corporation

William B. Poff
Thomas A. Leggette
Woods, Rogers, Muse,
Walker & Thornton
P.O. Box 720
Roanoke, Virginia 24004
703/982-4200

Counsel for James F. Douthat, Substitute Trustee



George V. Hanna, III
Hayden J. Silver, III
Moore, Van Allen, Allen
and Thigpen
3000 NCNB Plaza
Charlotte, NC 28280
704/374-1300

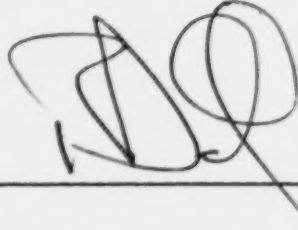
Counsel for NCNB Financial Services



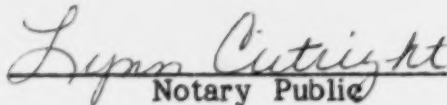
CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of December, 1984 I have mailed, postage prepaid, three copies of the foregoing JOINT BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI to counsel for the Petitioner at the following address:

Donald E. Earls
940 Park Avenue
P.O. Box 710
Norton, Virginia 24273



Sworn to and subscribed before me this the
3rd day of December, 1984.


Notary Public

My Commission Expires June 13, 1988



APPENDIX A

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION**

NCNB FINANCIAL SERVICES, INC.,

Plaintiff,

v.

COLEMAN FURNITURE CORPORATION, ET AL,

Defendants.

May 19, 1983



IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

IN RE:)	
)	
COLEMAN FURNITURE CORPORATION)	Bankruptcy No.
)	7-82-01410
Debtor)	
)	
NCNB FINANCIAL SERVICES, INC.,)	Adversary Proceeding
)	No. 7-82-0806
Plaintiff,)	
)	
v.)	
)	<u>ORDER</u>
COLEMAN FURNITURE CORPORATION)	
ET AL.,)	
)	
Defendants.)	

Came this day, Coleman Furniture Corporation, J. B. Shumate, Jr., NCNB Financial Services, Inc. and Bert Ely, Trustee, by counsel, pursuant to proper notice and hearing. Having heard the argument of counsel, the Court finds and concludes that:

1. DMI Furniture, Inc. has withdrawn its offer to purchase certain assets of Coleman Furniture Corporation ("debtor") on the terms set forth in the order entered herein April 29, 1983, (the "order"), requiring said order to be modified.



2. A reorganization of the debtor whereby the debtor would continue operations is not feasible as there are no reasonable prospects for a successful reorganization of the debtor.

3. A sale of the debtor as a going concern is not feasible.

4. NCNB Financial Services ("Financial Services") has a valid, perfected and properly procured security interest in the assets of the debtor which is a valid, prior, first lien security interest in such assets; and

5. The Court in its discretion should grant the motion of Financial Services to abandon the assets of the debtor to Financial Services and to modify the stay now in effect to allow Financial Services to realize on its security interest in said assets.

Accordingly, it is hereby ADJUDGED and ORDERED that:

1. All of the assets of the debtor, excluding choses in action, the debtor's Pension Fund and certain monies to be held by the Trustee as hereinafter described, are abandoned from the debtor's estate to Financial

Services and the stay in effect pursuant to 11 U.S.C. § 362 is modified as to Financial Services to allow Financial Services to take possession of all assets abandoned herein and to realize on its security interest in said assets.

2. Financial Services, under the terms of its security documents, is authorized to enter into and execute such documents transferring title to the assets of the debtor abandoned herein as may be necessary to pass full and complete title, free and clear of all liens, claims, encumbrances and obligations.

3. Financial Services shall immediately receive the assets of the debtor pursuant to this Order, except as otherwise herein provided, with any funds realized from said assets to be applied by Financial Services to its secured debt.

4. The Trustee is authorized to use NCNB National Bank of North Carolina as his principal depository.

5. The Trustee shall collect from the current outstanding accounts receivable of the debtor a sum not to exceed \$175,000, to be held by the Trustee in an account at NCNB National Bank and not now disbursed to



Financial Services, which funds shall be available for the payment of such priority claims and administrative expenses as hereafter determined by the Court with the excess remaining paid to Financial Services. Financial Services shall immediately receive the other monies held by the Trustee including monies collected from the outstanding accounts receivable of the debtor.

6. Financial Services is permitted to offer to purchase the claims of the unsecured creditors of the debtor, excluding the claims of J. B. Shumate, Jr., if any, for the sum of \$37,500, which offer shall be tendered to Raymond R. Robrecht, Esq., attorney for the Creditors Committee, and shall be for the payment of \$37,500 (which sum may include attorney's fees for the attorney for the Creditors Committee as may be approved by the Court) to those consenting unsecured creditors, conditioned upon the acceptance of eighty (80) percent of said unsecured creditors, both in number and amount. If approved by Raymond R. Robrecht, this offer shall be submitted to said unsecured creditors for acceptance or rejection on or before July 5, 1983, together with such information which Raymond R. Robrecht may determine necessary.



7. Bert Ely was appointed trustee by this Court on February 10, 1983, to determine, among other things, the feasibility of operating the business of the debtor as a going concern. Mr. Ely has now reported to the Court that the operation of the business as a going concern is not feasible and that the assets of the debtor as described above should be abandoned to Financial Services. As a result of this abandonment, Mr. Ely has determined that it is no longer necessary or is the best interests of the Estate for him to continue as Trustee and has tendered his resignation to the Court. The Court accepts the resignation of Mr. Ely and appoints Roy V. Creasy as Trustee effective May 17, 1983.

8. This proceeding is continued on the docket of this Court for a report concerning any sale of the assets of Coleman, any administrative expenses incurred in this proceeding, the report of Raymond R. Robrecht of the acceptance or rejection of the offer of Financial Services to the unsecured creditors, and the report of Financial Services of the application of monies paid to it on the outstanding indebtedness secured by said assets together with such other matters as may be properly before the Court.

9. The order is intended to modify and supplement the order entered herein on April 29, 1983.

ENTER:

s/James C. Turk
Judge

I request the entry of this Order:

s/James F. Douthat
**Counsel for NCNB Financial Services
Inc.**



APPENDIX B

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION**

NCNB FINANCIAL SERVICES, INC.,

Plaintiff,

v.

COLEMAN FURNITURE CORPORATION, ET AL,

Defendants.

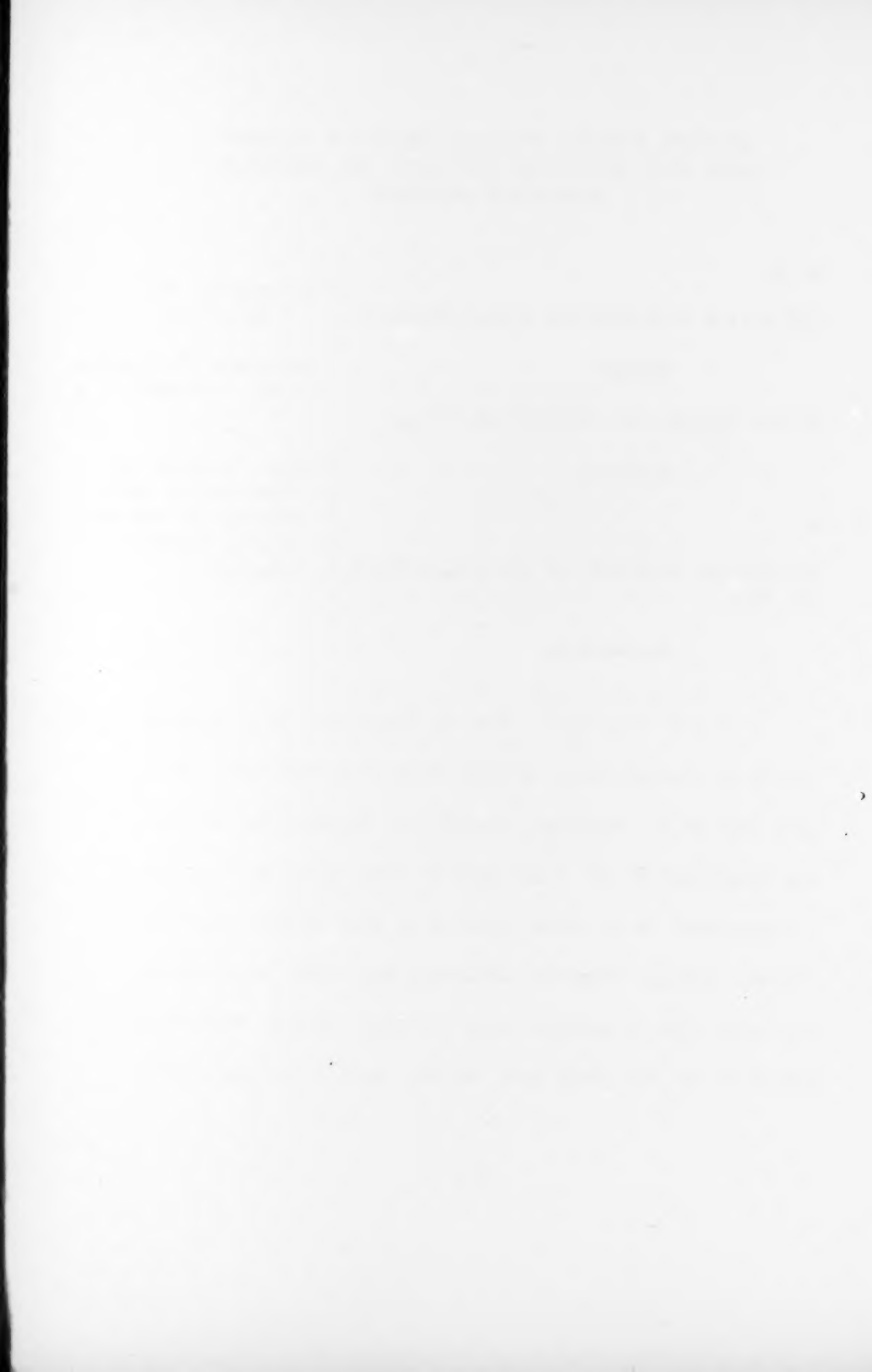
November 8, 1983



IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

In Re)	
COLEMAN FURNITURE CORPORATION,)	Bankruptcy No.
)	7-82-01410
Debtor)	
NCNB FINANCIAL SERVICES, INC.,)	Adversary Proceeding
)	No. 7-82-0806
Plaintiff,)	
v.)	(Re: Transfer of
COLEMAN FURNITURE CORPORATION,)	Chancery # 5081
ET AL.,)	pending in Circuit
)	Court, Pulaski
Defendants.)	County)

Came this day, Joe B. Shumate, Jr , Pulaski Furniture Corporation, NCNB Financial Services, Inc., and James F. Douthat, Substitute Trustee, by counsel, and represented (1) that Joe B. Shumate, Jr., is the complainant in a cause pending in the Circuit Court of Pulaski County, Virginia, Chancery No. 5081, seeking to declare the trustee's sale of real estate described therein to be null and void; and (2) that the



respondants therein, NCNB Financial Services, Inc., Pulaski Furniture Corporation and James F. Douthat, Substitute Trustee, filed a motion to dismiss said cause, alleging the United States District Court for the Western District of Virginia to have the sole and exclusive jurisdiction of the matters at issue therein and; further the parties hereto do hereby move this Court to transfer said cause to the United States District Court for the Western District of Virginia, Roanoke Division, and, having heard and considered the argument of counsel and being advised that related actions to said cause are pending in the United States District Court for the Western District of Virginia, and, being of the view that a substantial economy of time and money for the litigants and this Court can be achieved by affecting said transfer, it is hereby ORDERED that said cause be and hereby is transferred to the United States District Court for the Western District of Virginia, Roanoke Division, and the Clerk of the Circuit Court of Pulaski is directed to forward all



papers filed therein to the Clerk of the United States
District Court for the Western District of Virginia.

ENTERED: 8th day of November, 19

s/James C. Turk
James C. Turk, Chief Judge

We request the entry of this Order:

Joe B. Shumate, Jr.

By: John C. Quigley, Jr.
P.O. Box 886
Radford, Virginia 24141

NCNB Financial Services
James F. Douthat, Substitute Trustee

By: s/James F. Douthat
James F. Douthat
Hazelgrove, Dickinson, Rea,
Smeltzer & Brown
P.O. Box 1218
Roanoke, Virginia 24006-1218

George V. Hanna, III
Moore, Van Allen and Allen
3000 NCNB Plaza
Charlotte, North Carolina 28280



Pulaski Furniture Corporation

By: s/Benjamin C. Ackerly (jfd)
Benjamin C. Ackerly
707 East Main Street
P.O. Box 1535
Richmond, Virginia 23212



APPENDIX C

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION**

JOE B. SHUMATE, JR.,

Plaintiff,

v.

JAMES F. DOUTHAT, SUBSTITUTE TRUSTEE, ET AL,

Defendants.

APRIL 6, 1984



IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

IN RE:)	
)	
COLEMAN FURNITURE)	
CORPORATION,)	
)	
Debtor)	
)	
JOE B. SHUMATE, JR.,)	No. 83-M-16-R
)	(Re: Transfer of
Plaintiff,)	Chancery No. 5081
)	pending in Circuit
)	Court of Pulaski
)	County)
JAMES F. DOUTHAT,)	
SUBSTITUTE TRUSTEE, et al.)	
)	
Defendants.)	

In accordance with a bench opinion, and after having heard the plaintiff's evidence in this case and argument of counsel, the motions of each of the defendants for a directed verdict are hereby granted, and judgment is entered on behalf of all the defendants. The sale which is the subject of this dispute is approved and confirmed and this case is hereby dismissed and stricken from the docket of the court.

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ENTER: This 6th day of April, 1984

s/Glen M. Williams
U. S. District Judge